

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 19, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID VIRGIL WYMAN,

Defendant.

NO: 2:18-CR-59-RMP

ORDER DENYING WITHOUT
PREJUDICE DEFENDANT'S
CONSTRUED MOTION FOR
COMPASSIONATE RELEASE

BEFORE THE COURT is a construed Motion for Compassionate Release, ECF Nos. 49 and 51. The Court has reviewed Defendant's motion, ECF No. 49; a response brief from the Government, ECF No. 52; a reply from Defendant, ECF No. 53; and is fully informed.

BACKGROUND

This Court sentenced Mr. Wyman on February 5, 2020, to 58 months incarceration for committing robbery in the first degree on an Indian reservation, in violation of 18 U.S.C. § 1153 and RCW 9A.56.200. ECF Nos. 44 and 47.

Pursuant to the Judgment, Mr. Wyman must serve his federal sentence concurrent

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1 to an 82-month sentence imposed by the State of Washington. *See* ECF No. 47 at
2 2. Mr. Wyman is serving his concurrent sentences at the Washington State
3 Department of Corrections facility in Shelton, Washington. *See* ECF No. 49-1.

4 Mr. Wyman asks the Court to release him from his federal sentence to
5 reunite him with his family during the novel coronavirus pandemic (COVID-19) to
6 “stand at their side in their time of need.” ECF No. 49 at 2. Mr. Wyman is 34
7 years old. ECF No. 49.

8 **RELEVANT LAW**

9 Federal Rule of Criminal Procedure 35 generally delineates the parameters of
10 a district court’s ability to modify a prison sentence once judgment is entered. That
11 provision offers no relief to Defendant. However, 18 U.S.C. § 3582(c)(1)(A) also
12 reserves an opportunity for a reduced sentence if, after the Court considers the
13 factors under 18 U.S.C. § 3553(a) to the extent that they are applicable, the Court
14 finds that “extraordinary and compelling reasons warrant such a reduction” and the
15 reduction is “consistent with applicable policy statements issued by the Sentencing
16 Commission[.]”

17 The U.S. Sentencing Commission has issued a policy statement recognizing
18 certain circumstances as “extraordinary and compelling reasons” for purposes of
19 compassionate release, so long as “the defendant is not a danger to the safety of any
20 other person or to the community, as provided in 18 U.S.C. § 3142(g)”:

21 (A) Medical Condition of the Defendant.—

(i) The defendant is suffering from a terminal illness (i.e., a serious physical and advanced illness with an end of life trajectory)

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that ‘substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.’

(B) Age of the Defendant.—The defendant (i) is at least 65 years old;

(ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances—

(i) The death or incapacitation of the caregiver of the defendant’s minor child or minor children.

(ii) The incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons—As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S. Sentencing Guidelines Manual (“USSG”) § 1B1.13.

Up until December 21, 2018, the Court could reduce a term of imprisonment for extraordinary and compelling reasons only upon motion by the Director of the United States Bureau of Prisons (“BOP”). However, section 603(b)(1) of the First Step Act modified section 3582(c)(1)(A) to allow a federal prisoner to move on his own behalf for a sentence reduction and compassionate release after exhausting all

1 administrative appeals of the BOP's refusal to bring such a motion or after "lapse of
2 30 days from the receipt of such a request by the warden of the defendant's facility,
3 whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). Section 1B1.13, USSG, has not
4 been updated since enactment of the First Step Act.

5 **DISCUSSION**

6 Mr. Wyman seeks release from incarceration to rejoin his family because of
7 COVID-19. Mr. Wyman observes that the pandemic is "affecting us all in a
8 strongly negative way." ECF No. 53 at 2. The Court empathizes with Mr.
9 Wyman's circumstances and those of incarcerated persons generally during this
10 pandemic. However, there are several reasons why the Court must deny Mr.
11 Wyman's motion for relief.

12 First, Mr. Wyman has not shown that he first asked BOP for compassionate
13 release or exhausted his appeal opportunity with BOP, so the statute, 18 U.S.C. §
14 3582(c)(1)(A), does not authorize this Court to grant compassionate release.

15 Second, Mr. Wyman is serving his sentence concurrently with his 82-month
16 state sentence and is in the physical custody of Washington State. *See* ECF No. 52
17 at 6. Therefore, Mr. Wyman currently is not in a position to ask BOP for
18 compassionate release as required by 18 U.S.C. § 3582(c)(1)(A). He is not in BOP
19 custody and would need to seek any release remedy first from Washington State
20 Department of Corrections who currently has him in custody.

1 Third, even if the Court reached the merits of Mr. Wyman's request for
2 compassionate release, he does not describe extraordinary and compelling
3 circumstances such as a serious medical condition, advanced age, or family
4 circumstances that qualify for a reduction of sentence and compassionate release.
5 Mr. Wyman also would have to persuade the Court that he does not pose a safety
6 risk to his community and that the 18 U.S.C. § 3553(a) factors favor release. *See* 18
7 U.S.C. § 3582(c)(1)(A); USSG § 1B1.13. Mr. Wyman does not make that showing
8 in his motion.

9 The Court encourages Mr. Wyman to continue on good behavior during his
10 incarceration and to take all possible precautions to protect his health. However, at
11 this time, the Court does not find compassionate release to apply to Mr. Wyman's
12 circumstances.

13 Accordingly, Defendant's construed Motion for Compassionate Release,
14 **ECF No. 49**, is **DENIED WITH LEAVE TO RENEW**.

15 The District Court Clerk is directed to enter this Order and provide copies to
16 counsel and to Mr. Wyman.

17 **DATED** May 19, 2020.

18 s/ Rosanna Malouf Peterson
19 ROSANNA MALOUF PETERSON
20 United States District Judge
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